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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/076,247

01/14/2002

Adolfo Goren

P 0280702

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04/27/2006

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EXAMINER

COE, SUSAN D

ART UNIT

PAPER NUMBER

1655

DATE MAILED: 04/27/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

<b>Office Action Summary</b>	<b>Application No.</b> 10/076,247	<b>Applicant(s)</b> GOREN ET AL.	
	<b>Examiner</b> Susan D. Coe	<b>Art Unit</b> 1655	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

#### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### Status

- 1) ☒ Responsive to communication(s) filed on 28 February 2006.
- 2a) ☐ This action is **FINAL**.                      2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### Disposition of Claims

- 4) ☒ Claim(s) 1-43 is/are pending in the application.
- 4a) Of the above claim(s) 1-7, 11, 14-38, 41 and 42 is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 8-10, 12, 13, 39, 40 and 43 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

#### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

#### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All    b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

#### Attachment(s)

- |  |   |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892)   | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)                                   | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152)             |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)<br>Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____  |

## DETAILED ACTION

### *Continued Examination Under 37 CFR 1.114*

1. A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on February 28, 2006 has been entered.
2. Claim 43 has been added.
3. Claims 1-43 are currently pending. The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

### *Election/Restrictions*

4. In the reply filed on May 18, 2005, applicant elected of Group II, claims 8-13 and 29-42 (now including claim 43), *Allium cepa* for species A and rhinovirus for species B **without** traverse.

In the current response, applicant states that he “still disagree[s] with the restriction requirement.” However, applicant did not traverse the restriction requirement in the last response or any previous responses; thus, the use “still disagree” is confusing because applicant has not previously traversed the requirement. Therefore, the restriction requirement was properly made final because applicant did not offer any arguments against the requirement. In addition, the secondary restriction requirement was deemed necessary due to applicant's assertion that the different species were not obvious over each other and are patentably distinct.

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This was set forth with the secondary restriction requirement. The subsequent Office action was properly made final because there were no new grounds of rejection set forth.

5. Claims 1-7, 11, 14-38, 41, and 42 are withdrawn from further consideration pursuant to 37 CFR 1.142(b) as being drawn to a nonelected invention and species, there being no allowable generic or linking claim. Election was made **without** traverse in the reply filed on May 18, 2005.

6. Claims 8-10, 12, 13, 39-40 and 43 are examined on the merits solely in regards to the elected species.

#### *Claim Objections*

7. Claim 43 is objected to because of the following informalities: there is no period at the end of the claims. Appropriate correction is required.

#### *Claim Rejections - 35 USC § 103*

8. Claims 8-10 and 12 are rejected under 35 U.S.C. 103(a) as being unpatentable over Derwent English abstract of Chinese Pat. Appl. No. 1089152 A (1994) for the reasons set forth in the previous Office action.

All of applicant's arguments regarding this ground of rejection have been fully considered but are not persuasive. Applicant argues that the reference does not teach that onion is the active ingredient in the method of treating the common cold taught by the reference. However, applicant's claims are drawn to a composition comprising onion for treating the common cold. The reference teaches a composition comprising onion for treating the common

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cold. Thus, the reference teaches the claimed invention even if the reference does not specifically state that onion is the active ingredient.

In addition, applicant argues that the reference does not teach the claimed particle sizes. Claim 1 claims a large distribution of particle size, i.e. from 1 to 1400 microns. 1400 micron would be a large particle while 1 micron would be very small. It is reasonable to assume that most powdered or granulated compositions such as that taught by the reference would fall within this size limitation.

Applicant also argues that the reference does not teach the claimed water content or the effective amount. However, the amount of a specific ingredient in a composition is clearly a result effective parameter that a person of ordinary skill in the art would routinely optimize. "[W]here the general conditions of a claim are disclosed in the prior art, it is not inventive to discover the optimum or workable ranges by routine experimentation." *In re Aller*, 220 F.2d 454, 456, 105 USPQ 233, 235 (CCPA 1955). Thus, optimization of general conditions is a routine practice that would be obvious for a person of ordinary skill in the art to employ. It would have been customary for an artisan of ordinary skill to determine the optimal amount of each ingredient to add in order to best achieve the desired results. Thus, absent some demonstration of unexpected results from the claimed parameters, this optimization of ingredient amount would have been obvious at the time of applicant's invention. Furthermore, the water content would also be obvious to optimize because a person of ordinary skill in the art would recognize that a high water content would make the granules and powders stick together. Thus, the water content is also a parameter that is considered within the prevue of routine optimization.

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9. Claims 8-10, 12, 13, 39-40 and 43 are rejected under 35 U.S.C. 103(a) as being unpatentable over Derwent English abstract of Chinese Pat. Appl. No. 1089152 A (1994) in view of US Pat. No. 4,409,237 for the reasons set forth in the previous Office action.

All of applicant's arguments regarding this ground of rejection have been fully considered but are not persuasive. Applicant reiterates the argument that CN '152 does not teach that the onion in the active ingredient. However, as discussed above, applicant's claims are drawn to a composition comprising onion for treating the common cold. The reference teaches a composition comprising onion for treating the common cold. Thus, the reference teaches the claimed invention even if the reference does not specifically state that onion is the active ingredient. The entire composition of CN '152 is obvious to optimize in the manner described in US '237. Thus, a composition comprising onion for treating the common cold is optimized in a manner that would lead to applicant's claimed invention.

In regards the limitations regarding water content, please note that US '237 specifically teaches that dry powders are desirable (see the Examples, specifically 4 and 5). Thus, this reference shows that the moisture content of powdered compositions is a parameter to be varied during routine optimization.

10. No claims are allowed.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Susan Coe whose telephone number is (571) 272-0963. The examiner can normally be reached on Monday to Thursday from 9:30 to 5:30.

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If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Terry McKelvey, can be reached at (571) 272-0775. The official fax phone number for the organization where this application or proceeding is assigned is (571) 273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Any inquiry of a general nature or relating to the status of this application or proceeding can be directed to the receptionist whose telephone number is (571) 272-1600.

*Susan D. Coe*  
4-25-06

Susan D. Coe  
Primary Examiner  
Art Unit 1655